to profit by their own injurious acts: Broom's Max. 215, 216 And although the transaction might not be strictly and technically a fraud, it has the same effect. And upon the same principle that the greater contains the less, it may be said with equal truth that, things equal to the same thing are equal to each other. So that whatever has the effect of a fraud in the management of a trust must be treated as a fraud: Rev. Code, § 2372; *Johnson* v. *Thweatt*, 18 Ala. 741; *Boney* v. *Hollingsworth*, 23 Id. 690; *Trippe* v. *Trippe*, 29 Id. 637; *Charles* v. *Du Bose*, Id. 367; 1 Story's Eq., § 322; 1 Id. 323.

Decree affirmed.

Supreme Court of Michigan.

JAMES FOSTER *v.* THE PEOPLE.

An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty.

Evidence that a person charged with larceny had previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.

THE opinion of the court was delivered by

CAMPBELL, J.—The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt in receiving the horse in Detroit and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what that defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defence. The court overruled this objection, and then the witness declined

to answer. The record does not show on what ground the witness declined. The court refused to direct him to answer. Whether the witness had or had not such a privilege, it was not an objection which any one but the witness himself could raise upon the trial, and probably the court overruled it, when made by the prosecutor, on this ground, inasmuch as when made by the witness it was allowed. Privilege from crimination or the like is no ground for refusing to allow questions to be put, if not objected to by the party privileged: 1 Greenl. Ev. § 451; Roscoe Cr. Ev. p. 174; note to *Thomas* v. *Newton*, 1 Moody & Malk. 48; *Commonwealth* v. *Shaw*, 4 Cush. R. 594; *Southard* v. *Redford*, 6 Conn. 254.

It cannot be reasonably claimed that the question was too irrelevant to be answered, even if such an objection could be taken by a witness. Any defence which he may have had against the charge could only have related to matters directly bearing upon what he had already testified to, because the charge was against both him and Foster, and anything throwing light upon any transaction connected with the history of the theft, from its inception to the arrest of the property in his hands, was receivable in evidence on the trial, and was properly received by the court. If excluded at all, it must be on some ground of privilege which justified the witness in refusing to disclose the facts referred to.

Nor can it be regarded as unimportant to enable the jury to appreciate the real character of the witness as a reliable narrator. It has always been understood that the testimony of accomplices against a prisoner should be scanned with jealousy; and in many cases it has been intimated that no conviction could properly be had upon that alone. We do not hold to this extreme doctrine, but leave the credit of such persons to the jury; yet the quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and if the position they occupy indicates moral turpitude, there is a necessity for more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it.

The witness not having given any reason for refusing to answer, we can only infer what reasons he might have had; and the only ones that have been suggested from any quarter are, 1st. His

supposed right to keep to himself his communications with counsel relative to his defence; and, 2dly. His right to avoid criminating himself in any way.

It has been suggested that the crimination which might be created by an answer to the question would go beyond any liability upon the larceny and apply on a charge of perjury, which might lie if he swore to facts making him responsible, and had before made an affidavit contradicting those facts. If any necessary contradiction was created by the affidavit, it is difficult to see how he could be put in any worse condition by explaining to what it referred. But it is unnecessary to consider that point here, because no such contradiction appeared. The affidavit that he had a defence on the merits to this information agrees well enough with his testimony, because, while proving conclusively his guilt, he has, so far as his testimony is concerned, disproved any liability under this information, which charged an offence in Macomb county, while he swears to acts none of which were acknowledged to have been committed by him or by his procurement in that county. According to his showing, he could be held in Wayne and in Monroe, but not in Macomb.

The question therefore narrows itself to an inquiry whether, after undertaking voluntarily to explain the transactions connected with the larceny and disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, he can then refuse to answer further and be protected against further disclosures relating to the same transactions.

No principle is better settled than that no inference can be permitted against a witness because he asserts his privilege: *Carne* v. *Litchfield*, 2 Mich. R. 340; *Rose* v. *Blakemore*, Ryan & Moody 382; Lord ELDON in *Lloyd* v. *Passingham*, 16 Ves. R. 64; *Knowles* v. *People*, 15 Mich. R. 409. This doctrine is necessary in order to make the privilege of any value. But the necessity of making the privilege effectual renders it equally necessary to take care that where such protection would lead to absurd or unreasonable consequence, it shall not be allowed.

It would certainly lead to most startling results if an accomcomplice, who had made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could

refuse to have his veracity or fairness, or bias or corruption tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself from the criminal exposure; and it is of great importance to learn why such a course is adopted. If in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty by swearing away that of another, it can be completely prevented at the option of the witness himself; it would be difficult to justify the rule which allows co defendant to be used by the prosecution at all, when they cannot be received for the defence. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself; and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief.

The cases which apply to ordinary witnesses, who do not stand properly on the same footing with accomplices, do not in any way sanction such a stretch of privilege. It has been decided, and is the received doctrine, that a witness is entitled to decline answering not only questions which directly criminate him, but also any questions which may apply to facts forming links in the chain of criminating evidence. And where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point, and determine that he will go no further in that direction. He may judge that his protection does not require him to avoid replying concerning some facts, when as to others the tendency is or seems to him more direct and incriminating. Yet even this doctrine, upon the particular facts of the case, although the witness refused to answer the only question which applied directly to the guilt involved, was held in so much doubt in *Regina* v. *Gurbett*, Dennison's Cr. Cas. 236, s. c. 2 Car. & Kir. 474, that the Court of Exchequer Chamber was unable to agree on the first argument, and on the second argument, after some changes in the

Bench, the three Chiefs of the Courts, DENMAN, WILDE and POLLOCK, and PATTESON, COLERIDGE and ERLE, JJ., dissented from the other nine, and held the witness had gone too far to claim any further privilege. He had undoubtedly gone very far, but, nevertheless, he had not convicted himself, and the decision, while right in its principles, was also correct, as it would seem, upon the facts. As no opinions are reported, we cannot ascertain the precise views of the judges, who do not seem to have agreed as to how far the witness had claimed his privilege. But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result that an answer concerning it may supply means of conviction by aiding the other proofs which it indicates or supplements on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offence is waived. The law does not endeavor to preserve any vain privileges; and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. The distinction between the cases where a witness has or has not furnished sufficient evidence to criminate himself, is clearly recognised in *Amherst* v. *Hollis*, 9 N. H. 107, and in *Coburn* v. *Odell*, 10 Foster 540, as well as incidentally in numerous other cases, which hold that when he had once made a decisive disclosure his privilege ceased. And the further consideration is also recognised that a witness has no right, under pretence of a claim of privilege, to prejudice a party by a one-sided or garbled narrative.

As Mr. Phillips very neatly expresses it: "A witness may waive his privilege and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer,

or to refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party:" 2 Phill. Ev. (Edw. ed.) 935.

Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he had attempted to relate. This view is adopted by the text writers, and is very well explained in several of the authorities where the principle is laid down and enforced: 1 Starkie Ev. 206, 19th Am. ed.; Roscoe's Cr. Ev. 174; 1 Greenl. Ev. § 451; 2 Phill. Ev. 935; 2 Russ. Cr. 931; *Coburn* v. *Odell*, 10 Foster 540; *State* v. *K.*, 4 N. H. 562; *State* v. *Foster*, 3 Foster 348; *Foster* v. *Pierce*, 11 Cush. 437; *Brown* v. *Brown*, 5 Mass. 320; *Amherst* v. *Hollis*, 9 N. H. 107; *Low* v. *Mitchell*, 18 Me. 272; *Chamberlain* v. *Willson*, 12 Vt. 491; *People* v. *Lohman*, 2 Barb. 216; *Norfolk* v. *Gaylord*, 28 Conn. 309.

In *Foster* v. *Pierce*, 11 Cush. R. 437, it is held that where a witness knows in the beginning that his testimony in the case must expose him to a criminal charge, he must claim his privilege in the outset or waive it altogether. And as applied to cases in which that is the gist of the inquiry, this rule appears to be necessary and just to prevent partial and unfair statements. It is probably not designed to apply to any others.

When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent while under a joint indictment; and if not indicted they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can in any case allow to them any privilege whatever when they have gone so far already as to any

matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matters under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges: 2 Russ. Cr. 927. Even on the principles applied to ordinary witnesses they would not be protected, as we have seen, after making any conclusive disclosure. They come upon the stand for no other purpose, and they have never been allowed, under such circumstances, to stop short of a full disclosure. And no privilege is recognised as then belonging to them: 2 Phill. Ev. (Edw. ed.) 930 note; 2 Russ. Cr. 927; *Commonwealth* v. *Price*, 10 Gray's R. 472; *State* v. *Coudry*, 5 Jones's L. R. 418; *Brown* v. *Brown*, 5 Mass. R. 320; 2 Phill. Ev. 936.

The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defence, as alluded to in his affidavit for continuance.

The other error assigned was, that the court ought not to have refused to allow respondent to prove that, within the previous six months, and before the time of the theft, he had applied to the witness Collyer to purchase a horse. This was to corroborate a defence set up that respondent purchased the horse alleged to have been stolen.

We cannot perceive how a desire or offer to purchase a horse tends to prove that a person did not subsequently steal one. Even the most inveterate thieves must sometimes purchase articles; and the fact that they do so, would not at all interfere with their misconduct as to others. The evidence was clearly inadmissible, and its rejection was proper.

But for the other error there should be a new trial.

The other justices concurred.